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No Exit - The Roberts Court and the Future of Election Law

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NO EXIT? THE ROBERTS COURT AND THE FUTURE OF ELECTION LAW

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I. INTRODUCTION

Even before the death of Chief Justice William H. Rehnquist and the retirement of Associate Justice Sandra Day O'Connor, election law scholars had declared that the Supreme Court had reached "doctrinal interregnum."[1] "[L]ost in the political thicket,"[2] the factions on the Court had begun going through the motions like a pair of punch-drunk fighters.[3] In the campaign finance arena, the Court's jurisprudence was becoming increasingly incoherent.[4] Some scholars lamented that the Court appeared to have "thrown in the towel"[5] in the mammoth *McConnell v. FEC*[6] case, but others defended the incoherence on the postmodern grounds that the Court does not take its doctrine seriously, so we shouldn't either.[7]

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1. Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 517 (2004).

2. *Id.*

3. *Id.* at 516.

4. Richard L. Hasen, Buckley *is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 32–33 (2004).

5. Samuel Issacharoff, *Throwing in the Towel: The Constitutional Morass of Campaign Finance*, 3 ELECTION L.J. 259, 264 (2004).

6. 540 U.S. 93 (2003).

7. *See, e.g.*, Daniel R. Ortiz, *The Empirics of Campaign Finance*, 78 S. CAL. L. REV. 939, 944–45 (2005). ("I do not disagree with Hasen that the Court's opinions in these cases have downplayed empirical evidence. They have. The Court often does not carefully consider evidence bearing directly on those issues that existing doctrine makes relevant. I disagree with Hasen, however, about the import of that observation. Are the Justices using evidence merely to shore up, where possible, their 'simple value judgments . . . on the wisdom of particular campaign finance laws'? If so, Hasen is right to

Campaign finance law is no aberration. Voting rights scholars have questioned whether voting rights law is at war with itself,[8] and debated whether the Supreme Court furthered or hindered minority voting rights in *Georgia v. Ashcroft*,[9] its most recent decision interpreting Section 5 of the Voting Rights Act.[10] That scholars need to ask such a fundamental question shows the level of difficulty with the Court's doctrine.

In the area of partisan gerrymandering, the Court issued a "'monumental non-decision'"[11] in *Vieth v. Jubelirer*,[12] splitting 4-1-4.[13] Justice Kennedy—who provided the swing vote—refused to take a position on when partisan gerrymanders violate the Constitution.[14] Later the same Term, the Court summarily affirmed a lower court decision on the one-person, one-vote rule.[15] In doing so, the Court simultaneously upset existing precedent regarding permissible deviations from strict mathematical equality in redistricting, and implicitly suggested—contrary to *Vieth*—that naked partisan interest can be a reason for policing gerrymanders that violate the one-person, one-vote rule.[16]

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criticize them. There is another possibility, however, that Hasen does not discuss. The Court may treat evidence somewhat cursorily in its opinions, not because it is proceeding on its instincts or working out the Justices' individual views of what the political system should look like, but because it has lost faith in the kinds of questions the existing doctrinal apparatus makes relevant. If the Court believes that existing doctrine is asking the wrong questions and therefore making the wrong evidence relevant, and the Court feels unable, for whatever reason, to revise constitutional doctrine to better conform it to what constitutional principle requires, we should expect the opinions to offer unsatisfying evidentiary and doctrinal analyses except in those odd instances in which existing doctrine and the Court's actual view of constitutional principle point in the same direction." (quoting Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885, 917 (2005)).

8. *See* Richard H. Pildes, *Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV 1517, 1523 (2002).

9. 539 U.S. 461 (2003).

10. *Compare* Gerken, *supra* note 1, at 531–40 (positing that *Georgia v. Ashcroft* is likely to improve application of Section 5 of the Voting Rights Act), *and* Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 89–101 (2004) (same), *with* Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 36 (2004) (concluding *Georgia v. Ashcroft* is harmful to the minority interests Section 5 protects).

11. Charles Lane, *Justices Order New Look at Tex. Redistricting Case,* WASH. POST, Oct. 19, 2004, at A21 (quoting this author's characterization of *Vieth*); *see also* Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After* Vieth, 3 ELECTION L.J. 626, 627–28 (2004) (characterizing *Vieth* as "a disappointment" and arguing "the Court should remain content staying out of the business of policing partisan gerrymandering until a societal near-consensus emerges regarding the permissible range of using voters' party affiliation in redistricting").

12. 541 U.S. 267 (2004).

13. *See id.* at 271, 306, 317, 343, 355.

14. *See id.* at 306–17 (Kennedy, J., concurring).

15. Cox v. Larios, 542 U.S. 947 (2004) (summary affirmance).

16. *See* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 567–68 (2004) ("Thus, while *Vieth* essentially cuts off first-order political gerrymandering claims—that is, plaintiffs cannot get a plan struck down simply by showing that it constitutes an excessively partisan gerrymander—*Cox v. Larios* restores an opportunity for second-order judicial review of political gerrymanders: if a plan contains any population deviations, a court may decide that the deviations are caused by impermissible partisanship and strike

Meanwhile, the Court has not yet explained the scope of its equal protection ruling in *Bush v. Gore*.[17] As predicted,[18] courts and scholars have divided on both the precedential value of the decision and, assuming the decision has precedential value, the precise reach of its holding. The country dodged a bullet when the margin in the 2004 election was not razor-thin, but litigation regarding these "nuts and bolts"[19] election issues is increasing without any guidance yet from the Supreme Court on constitutional limits.[20]

While it is hard to know for sure, the doctrinal incoherence and uncertainty of the Supreme Court's recent election law decisions could well be the product of the same group of nine Justices deciding too many of these cases together over a number of years: Positions may have hardened, new ideas may be scarce, and the ability to convince a colleague to change a position may be slight. The Justices seemed much like the protagonists in Jean-Paul Sartre's play, *No Exit*, who found that Hell was being kept in a room with the same people for all eternity.[21]

With the change of two Justices on the Supreme Court, exit from doctrinal incoherence and uncertainty becomes possible. The replacement of Chief Justice Rehnquist with new Chief Justice John Roberts[22] and the replacement of Justice O'Connor with Justice Samuel Alito[23] could provide an opening for major changes in Supreme Court election law doctrine. This is especially true with Justice O'Connor's departure because she held the swing vote in key election law cases.

What sort of changes should we expect from the Roberts Court? Making predictions is exceedingly difficult when those who have not expressed (or not recently expressed) views on these subjects likely will hold the swing votes, and those who are concerned with respecting (even wrong-headed) precedent could prove a strong force. Additionally, the Justices' views certainly may change over time. Still, I work under the assumption that a conservative President, who apparently committed himself to appointing justices in the mold of Justices Thomas

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the plan down as a formal matter for failure to comply with one-person, one-vote. But in order to hold that a deviation is unjustified, courts must necessarily develop some idea of where the line between constitutionally legitimate and constitutionally illegitimate partisanship falls. In short, they must do exactly what four of the Justices who rejected the plaintiffs' claims in *Vieth* . . . thought could not be done." (citations omitted)).

17. 531 U.S. 98 (2000).

18. *See* Richard L. Hasen, *The Benefits of "Judicially* Unmanageable" *Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1469, 1497 (2002) (discussions the opacity of the opinion and predicting that the Court will eventually sort out the various lower courts' interpretations).

19. Richard L. Hasen, Bush v. Gore *and the Future of Equal Protection Laws in Elections*, 29 FLA. ST. U. L. REV. 377, 377 (2001).

20. *See* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 956–57 (2005).

21. JEAN-PAUL SARTRE, NO EXIT AND THREE OTHER PLAYS 47 (L. Abel trans., Vintage Books Ed. 1955) ("There's no need for red hot pokers. Hell is—other people!").

22. Charles Babington & Peter Baker, *Roberts Confirmed as 17th Chief Justice*, WASH. POST, Sept. 30, 2005, at A1.

23. David D. Kirkpatrick, *Alito Sworn in as Justice After Senate Gives Approval*, N.Y. TIMES, Feb. 1, 2006, at A21.

and Scalia,[24] is unlikely to appoint Justices who in fact move the Court to the left. Instead, these new Justices could well move the Court to the right in key election law cases.

The result is that five to ten years from now, the ground rules for American political competition could undergo a major change. Within the next decade, we could see deregulation of campaign financing and a limitation of congressional power to impose national solutions to minority voting rights problems. We could also see the Court upholding state power to both redistrict for partisan gain and impose increasingly draconian election administration tools in the name of fraud prevention.

In recent years, some election law scholars have suggested that the Court exit from particular corners of the political thicket by relaxing its one-person, one-vote rules to allow for greater representation of minority rights or by abandoning its more conservative racial gerrymandering jurisprudence.[25] But if the Court makes a selective exit from the political thicket, it likely will not be in these areas. Rather, we can expect the Court to act in ways that undercut the power of the government to foster political equality through campaign finance and increase state power to regulate the electoral process in increasingly partisan ways.

However, wholesale exit from the political thicket appears unlikely. Since 2000, the Court has continued its trend of deciding major election law cases, though perhaps at a slower rate than in previous years.[26] But, the election law cases it has

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24. On the controversy over Bush's statements in this regard, see Media Matters for America, *Did Bush Promise to Appoint a Justice like Scalia? CNN's Bash Busted an "Urban Myth" with a Myth of Her Own, While Fred Barnes Changed His Story—Then Changed It Back Again*, Oct. 13, 2005, http://mediamatters.org/items/200510130005.

25. Grant M. Hayden, *The Supreme Court and Voting Rights: A More Complete Exit Strategy*, 83 N.C. L. REV. 949, 961 (2005) (arguing the Supreme Court should relax its one-person, one-vote standards); Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667, 694 (2002) (arguing the Supreme Court should end policing of racial gerrymandering). When I say the racial gerrymandering jurisprudence is "conservative," I mean only that it is supported by the more conservative Justices on the Court. For an argument that conservatives should dislike those cases, see Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779 (1998).

26. From January 2001 through the end of January 2006, the Supreme Court decided twelve election law cases with a written opinion. *See* Wis. Right to Life, Inc. v. FEC, 126 S. Ct. 1016 (2006); Clingman v. Beaver, 125 S. Ct. 2029 (2005); Vieth v. Jubelirer, 541 U.S. 267 (2004); McConnell v. FEC, 540 U.S. 93 (2003); Georgia v. Ashcroft, 539 U.S. 461 (2003); FEC v. Beaumont, 539 U.S. 146 (2003); Branch v. Smith, 538 U.S. 254 (2003); Republican Party of Minn. v. White, 536 U.S. 765 (2002); Utah v. Evans, 536 U.S. 452 (2002); FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001); Easley v. Cromartie, 532 U.S. 234 (2001); Cook v. Gralike, 531 U.S. 510 (2001). The Court also granted certiorari in a campaign financing case, *Randell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *cert. granted*, 74 U.S.L.W. 3199 (U.S. Sept. 27, 2005) (No. 04-1528), and agreed to hear a challenge to mid-cycle redistricting in Texas, *League of Latin American Citizens v. Perry*, 399 F. Supp. 2d 756 (E.D. Tex. 2005), *prob. juris. noted*, 74 U.S.L.W. 3351 (U.S. Dec. 12, 2005) (No. 05-204). At this pace, it is doubtful the Court will reach the average of sixty election law cases it has decided each decade since the 1960s. *See* RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 1–3 (2003).

decided since 2000 have been major ones, including one accompanied by the longest set of opinions in Supreme Court history.[27]

The remainder of this Article sets forth my speculation about the future of election law in the Roberts Court in four key areas: campaign finance, voting rights, partisan gerrymandering, and "nuts -and-bolts" election administration issues.

II. CAMPAIGN FINANCE: THE END OF THE NEW DEFERENCE?

Since the Supreme Court decided *Buckley v. Valeo*[28] in 1976, its campaign finance jurisprudence has swung like a pendulum. In *Buckley*—a compromise decision drafted by committee[29]—the Supreme Court upheld new federal limits on contributions to candidates, but struck down limits on independent spending and spending by candidates.[30] Although the *Buckley* Court decided many constitutional claims challenging the Federal Election Campaign Act Amendments of 1974, the contribution and expenditure limit holdings have proven to be the most important. The Court held that contribution limits did not run afoul of the First Amendment rights of freedom of speech and association because they entailed only a "marginal" restriction on free speech[31] and the government's interest in preventing corruption and the appearance of corruption justified the limits.[32] These interests, in contrast, could not justify the independent spending (and candidate spending) limits[33] because the limits threatened to restrict more directly core political speech protected by the First Amendment and presented a more attenuated risk of *quid pro quo* corruption or its appearance.[34] The Court also rejected political equality as justification for spending limits.[35]

In the years after *Buckley*, the Court initially showed much hostility toward campaign finance regulation,[36] striking down laws limiting contributions[37] and expenditures in ballot measure campaigns.[38] The Court also struck down a law

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27. "The opinions [in *McConnell v. FEC*] had the largest U.S. Reports page count (279, excluding the heading and syllabus) and second largest word count (89,694) in Supreme Court history." DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW: CASES AND MATERIALS 892 (3d ed. 2004).

28. 424 U.S. 1 (1976).

29. Richard L. Hasen, *The Untold Drafting History of* Buckley v. Valeo, 2 ELECTION L.J. 241, 245 (2003).

30. *Buckley*, 424 U.S. at 143. The Court also upheld a fairly comprehensive set of disclosure rules. *Id.* at 84; *see* Richard L. Hasen, *The Surprisingly Easy Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 3 ELECTION L.J. 251 (2004).

31. *Buckley*, 424 U.S. at 20.

32. *Id.* at 26.

33. *Id.* at 45.

34. Buckley v. Valeo, 424 U.S. 1, 46–48 (1976).

35. *Id.* at 48–49 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .").

36. For a more detailed history, see Hasen, *supra* note 4, at 39–41.

37. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 795 (1978).

38. Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 300 (1981).

limiting independent spending that was part of the system for the partial public financing of presidential campaigns.[39]

Since 2000, however, the Supreme Court's jurisprudence has shifted toward much greater deference to legislative determinations of proper campaign finance limitations. Elsewhere I analyze in detail the four cases making up what I have termed the "New Deference Quartet."[40] The most significant of these cases is the 2000 case, *Nixon v. Shrink Missouri Government PAC*.[41] In upholding the constitutionality of Missouri's campaign contribution limits for state offices, the *Shrink Missouri* Court made four important changes to its campaign finance jurisprudence.[42] First, the Court ratcheted down the level of scrutiny for reviewing contribution limits from *Buckley*'s "exacting" level of scrutiny[43] to one in which interests need only be "'sufficiently important'"[44] and "'closely drawn,'"[45] and not narrowly tailored to the government's interest.[46]

Second, the Court expanded the definitions of "corruption" and "the appearance of corruption" that serve to justify the government's interest in campaign finance regulations. The Court explained that corruption extended beyond arrangements to embrace "the broader threat from politicians too compliant with the wishes of large contributors."[47] As for the appearance of corruption, the Court remarked, "Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance."[48]

Third, and perhaps most significantly, the Court lowered the evidentiary burden for proving corruption or the appearance of corruption. The Court began by noting the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."[49] Although the Court insisted that "mere conjecture"[50] of potential corruption was not enough to support a campaign contribution limit, it held that Missouri could justify the need for its contribution limits to fight corruption or the appearance of corruption with some pretty flimsy evidence.[51] The evidence included an affidavit from a Missouri legislator who supported the

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39. FEC v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 501 (1985).

40. *See* Hasen, *supra* note 4, at 68; Hasen, *supra* note 7, at 886.

41. 528 U.S. 377 (2000).

42. *Id.* at 397–98. I provide greater details on these claims in Richard L. Hasen, Shrink Missouri, *Campaign Finance, and "The Thing that Wouldn't Leave,"* 17 CONST. COMMENT. 483, 490–97 (2000).

43. Buckley v. Valeo, 424 U.S. 1, 44 (1976).

44. *Shrink Mo.*, 528 U.S. at 388 (citing *Buckley*, 424 U.S. at 25).

45. *Id.* at 387 (quoting *Buckley*, 424 U.S. at 25).

46. *Id.* ("[T]he dollar amount of the limit need not be 'fine tun[ed].'" (citing *Buckley*, 424 U.S. at 30)).

47. *Id.* at 389.

48. *Id.* at 390.

49. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 391 (2000).

50. *Id.* at 392.

51. *Id.* at 398–95.

legislation stating that "large contributions have 'the real potential to buy votes'";[52] newspaper accounts suggesting possible corruption in Missouri politics;[53] and the passage of an earlier Missouri voter initiative establishing campaign contribution limits.[54]

Fourth, the Court created a high bar for challenging the constitutionality of a contribution limit as too low to prevent effective advocacy.[55] Refining (or changing) the effective advocacy test from *Buckley*, the Court's new test asks "whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless."[56] In an era of faxes, web pages, and e-mails, it is hard to imagine any contribution limit that would fail this test of constitutionality.

The Court's deference continued in *FEC v. Colorado Republican Federal Campaign Committee* (*Colorado II*),[57] *FEC v. Beaumont*,[58] and *McConnell v. FEC*.[59] In *McConnell*, the Court was very casual in the evidence it required to uphold both the "soft money" and "issue advocacy" provisions of the Bipartisan Campaign Reform Act of 2002 (commonly known as the McCain-Feingold law). Thus, the Court upheld a limit on soft money raising and spending by local political parties and candidates despite the lack of evidence that these entities and people were or could be used as conduits for the sale of access to federal elections officials.[60] Similarly, the Court upheld the law's provisions redefining the line between regulated election advertising and unregulated issue advertising without a serious examination of the extent to which the law's provisions were unconstitutionally overbroad in regulating protected speech.[61]

Moreover, the *McConnell* Court reaffirmed and strengthened its 1990 holding in *Austin v. Michigan State Chamber of Commerce*.[62] At issue in *Austin* was a Michigan law that barred corporations, other than media corporations, from using general treasury funds for independent expenditures in state election campaigns.[63] Under *Buckley*, the Court should have struck down the law regulating independent expenditures, at least absent proof that corporate independent expenditures in fact allowed for corruption of candidates. Instead, the Court upheld the law under a

52. *Id.* at 393 (quoting Shrink Mo. Gov't PAC v. Adams, 5 F. Supp. 2d 734, 738 (1998)).
53. *Id.* (citing *Adams*, 5 F. Supp. 2d at 738 n.6).
54. *Id.* at 394.
55. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 397 (2000).
56. *Id.*
57. 533 U.S. 431 (2001) (holding by a 5-4 vote that party spending coordinated with the parties' candidates could constitutionally be treated like a contribution to the candidate with the amounts limited by the government).
58. 539 U.S. 146 (2003) (upholding a ban on contributions from corporate treasuries by corporations organized solely for ideological purposes).
59. 540 U.S. 93 (2003).
60. *See* Hasen, *supra* note 4, at 46–52.
61. *Id.* at 52–56.
62. 494 U.S. 652 (1990).
63. *Id.* at 654.

tortured definition of corruption that looked much more like an equality rationale for regulation.[64]

Austin was considered a questionable precedent for many years,[65] in part because it stood in tension with *Buckley* and other post-*Buckley* cases. *McConnell* not only reaffirmed *Austin*'s application to corporations engaged in election-related activity, *McConnell*—without discussion—upheld *Austin*'s application to labor union spending as well.[66]

The New Deference cases exhibited increasing incoherence when measured against the *Buckley* standard. The Court continued to use the rhetoric of *Buckley*'s anticorruption rationale, but the reasoning was increasingly strained. With three of the Justices in the majority in these cases explicitly endorsing an equality or "participatory self-government" rationale for campaign financing limits,[67] and a fourth leading the New Deference revolution by writing most of the majority opinions,[68] apparently the need to keep Justice O'Connor's crucial fifth vote drove the disconnect between the Court's rhetoric showing fidelity to *Buckley* and the reality of New Deference. Justice O'Connor and Justice Stevens jointly authored the primary majority opinion in *McConnell*, which is as doctrinally wooden as a campaign finance opinion can be written. But the trend toward recognizing political equality in these cases led some commentators to predict the Court could move toward upholding spending limits in candidate elections and upholding contribution and spending limits in ballot measure elections.[69]

Those predictions, however, depended upon the continued stability of the Rehnquist Court. With the death of Chief Justice Rehnquist and the retirement of Justice O'Connor, the pendulum appears poised to swing back toward deregulation. Four Justices—Breyer, Ginsburg, Souter and Stevens—remain committed to the New Deference. On the other hand, Justice Thomas and, more recently, Justices Scalia and Kennedy, have attacked *Buckley* from the other end. They argue that contribution limits—like spending limits—should be subject to strict scrutiny and therefore often, if not always, be an unconstitutional infringement on the First Amendment like spending limits. They have also rejected the permissibility of expenditure limits *Austin* applied to corporations, which *McConnell* reaffirmed and

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64. *Id.* at 659–60 ("Regardless of whether [the] danger of 'financial *quid pro quo*' corruption may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." (citations omitted)).

65. *See* Hasen, *supra* note 4, at 42.

66. *See id.* at 57.

67. *See* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 649 (1996) (Stevens, J., dissenting) ("I believe the Government has an important interest in leveling the electoral playing field by constraining the cost of federal campaigns."); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 400–04 (2000) (Breyer, J., concurring) (setting forth his view of the participatory self government rationale for campaign finance regulation).

68. Justice Souter wrote the majority opinions in *Shrink Missouri*, *Colorado II*, and *Beaumont*.

69. *See* Hasen, *supra* note 4, at 67–72; Richard Briffault, McConnell v. FEC *and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147 (2004).

extended to unions.[70] Indeed, these Justices, joined by the late Chief Justice, dissented from major portions of the *McConnell* decision as well as in the three other New Deference cases.

While it is impossible to know how Chief Justice Roberts and Justice Alito will vote in future campaign finance cases, further expansion of the New Deference seems the least likely possibility. In one of the questionnaires he filled out for the Senate Judiciary Committee, Chief Justice Roberts wrote that he had worked for the Reagan and Bush Administrations because he generally agreed with the Administrations' policies.[71] Reagan and Bush supporters appear to side more with Justice Thomas on campaign finance questions than the Justices of the New Deference.[72] It therefore seems most probable that at least Chief Justice Roberts will fall on the Thomas side.

We will have an early test of the new Justices' views on the New Deference when the Court considers the constitutionality of Vermont's campaign finance law, which includes candidate spending limits, in the 2006 Term.[73] While *Buckley* did not categorically exclude the possibility of the Court upholding spending limits, it rejected many arguments that might justify spending limits. Campaign finance specialists would consider it an expansion of the power of the government for the Court to uphold candidate spending limits, while a contrary decision could simply be a reaffirmation of the *Buckley* status quo.

Thus, it seems unlikely the Roberts Court will continue the New Deference expansion. Rather, the most salient issue is whether the two new Justices will stick with the status quo, perhaps in the name of judicial modesty and stare decisis,[74] or

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70. Briffault, *supra* note 69, at 149 ("Moreover, not only did Justices Scalia and Thomas reiterate their prior rejection of *Buckley*'s validation of contribution restrictions, but Justice Kennedy, joined by Chief Justice Rehnquist, sharply criticized as '[u]nworkable and ill advised' the portion of *Buckley* subjecting contribution restrictions to less than strict scrutiny. Thus, *McConnell* is as precarious a victory for reform as it is sweeping. Both the specific holdings and the Court's basic approach to campaign finance restriction could be dramatically transformed if and when the membership of the Court changes." (quoting McConnell v. FEC, 540 U.S. 93, 311 (2003) (Kennedy, J., concurring and dissenting)).

71. Judge John G. Roberts, Jr., Responses of Judge John G. Roberts, Jr. to the Written Questions of Senator Dianne Feinstein Submitted on Behalf of Senator Barbara Mikulski 5, *available at* http://legalaffairs.org/howappealing/RobertsAnswers3.pdf ("I was generally sympathetic with the policies of both administrations.").

72. Indeed, when President Bush signed the McCain-Feingold legislation, he expressed serious doubt about the constitutionality of some of its major provisions. LOWENSTEIN & HASEN, *supra* note 27, at 892. He may have signed the bill in the belief that the Court would strike most of it down as unconstitutional, leaving in place more generous individual contribution limits that could benefit his reelection campaign. *See* Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. (forthcoming).

73. Landell v. Sorrell, 382 F.3d 91 (2d Cir. 2004), *cert. granted sub nom.* Randall v. Sorrell, 126 S. Ct. 35 (U.S. Sept. 27, 2005) (No. 04-1528). For more on this case, see Richard Biffault, *A Changing Supreme Court Considers Major Campaign Finance Questions:* Randall v. Sorrell, *and* Wisconsin Right to Life v. FEC, 5 ELECTION L.J. 74 (2006).

74. These were major themes sounded in the confirmation hearings of Justice Roberts. *See* Sheryl Gay Stolberg & Adam Liptak, *Roberts Fields Questions on Privacy and Precedents*, N.Y. TIMES, Sept. 14, 2005, at A1.

move more aggressively toward the Justice Thomas deregulation model for campaign financing.

We may soon have an answer to this question. First, the Court in the Vermont case could distinguish *Shrink Missouri* and strike down Vermont's low campaign contribution limits. Second, a more serious challenge to the New Deference should return before the Court next Term. This Term, before Justice Alito joined the Court, it surprisingly disposed of the *Wisconsin Right to Life* campaign finance case unanimously.[75] The Court examined whether a corporation that pays to run a television advertisement close to an election which is intended to be about issues, not about electing candidates, is entitled to an exemption from McCain-Feingold's prohibition on corporate and union electioneering ads close to an election.[76] The case in all likelihood will return to the Court in the 2007 Term.[77] A deregulationist Court could decide the issue narrowly by ruling that corporations are entitled to an exemption for "genuine issue ads."[78] But it is also possible that a deregulationist Court could move aggressively, reverse *Austin* and *McConnell,* and hold that corporations and unions, like individuals and other groups, have a right to spend unlimited sums independently to support or oppose candidates for office, thereby obviating the need for an exemption.

The one type of campaign finance regulation that does not appear to be in immediate danger of being overturned is disclosure. Though many open questions remain about the constitutionality of disclosure, all the current Justices, except Justice Thomas, reaffirmed in *McConnell* the government's ability to require disclosure in reports of contributions and expenditures in candidate campaigns.[79]

III. THE UNCERTAIN FUTURE OF THE VOTING RIGHTS ACT

In the voting rights arena, the Supreme Court has split 5-4 on some major issues, with Justice O'Connor casting the deciding vote. For example, Justice O'Connor wrote the decision in *Georgia v. Ashcroft*,[80] a case that makes it easier for jurisdictions covered under Section 5 of the Voting Rights Act to gain preclearance when they undertake redistricting. Section 5 prevents jurisdictions with a history of discrimination from making voting changes without first proving

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75. Wis. Right to Life, Inc. v. FEC, 126 S. Ct. 1016 (2006); Linda Greenhouse, *Court Opens Campaign Law to Challenges*, N.Y. TIMES, Jan. 24, 2006, at A16.

76. *Wis. Right to Life*, 126 S. Ct. at 1017.

77. The case is now back before the three-judge court.

78. Alternatively, the Court could rule that the particular corporation in question, Wisconsin Right to Life, is entitled to a special exemption available to certain ideological corporations. Such a ruling would require an expansion of the Court's earlier holding in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 241 (1986), granting an exemption to a similar group. For more on this point, see posting of Marty Lederman, marty.lederman@comcast.net, to election-law_gl@majordomo.lls.edu (Oct. 19, 2005), *available at* http://majordomo.lls.edu/cgi-bin/lwgate/ELECTION-LAW_GL/archives/election-law_gl.archive.0510/date/article-107.html.

79. *See* Hasen, *supra* note 29.

80. 539 U.S. 461 (2003). For background on the points made in this paragraph, see LOWENSTEIN & HASEN, *supra* note 27, at 159–87.

to the Department of Justice or a three-judge court in Washington, D.C., that the changes will not have the purpose or effect of "retrogressing" the position of minorities. Before *Ashcroft*, most commentators believed the test for retrogression in redistricting involved a rather mechanical counting of the number of majority-minority districts and a finding that the number had not decreased. *Ashcroft*, in contrast, imposes a less mechanical "totality of the circumstances" test which would allow some jurisdictions' redistricting plans to be precleared even if the total number of majority-minority districts decreases, provided minorities had other opportunities to influence the outcome of the political process.[81] For example, it may no longer be retrogression for a jurisdiction to decrease the number of majority-minority jurisdictions if new opportunities for minority influence exist. Such opportunities include the use of "'influence districts'"[82] whereby minority voters have some influence over who is elected in particular districts, even though they may lack the voting power to determine that choice out right.

It is not clear that *Ashcroft* will continue to state the law of Section 5 of the Voting Rights Act. Congress is expected to renew Section 5 in 2007, and some commentators have urged[83] Congress to write the new Section 5 so as to reverse *Ashcroft* and *Reno v. Bossier Parish School Board*.[84]

Ashcroft could remain important even if Congress reverses it for Section 5 purposes. Already, lower courts have looked to *Ashcroft* for guidance on what it means for jurisdictions to comply with Section 2 of the Voting Rights Act, an unexpiring provision that applies nationwide to ensure members of protected minority groups have the same opportunities to participate in the political process and to elect representatives of their choice.[85] In *Thornburg v. Gingles*,[86] the Supreme Court set out a three-part threshold test for determining whether the drawing of legislative districts violates Section 2, followed by a broader totality of

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81. *Ashcroft*, 539 U.S. at 480.

82. *Id.* at 482.

83. *See The Voting Rights Act: Section 5—Preclearance Standards: Oversight Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Mark A. Posner, Attorney-at-Law), *available at* http://judiciary.house.gov/media/pdfs/posner110105.pdf (advocating that Congress reverse *Reno v. Bossier Parish School Board* in renewed Voting Rights Act); Associated Press, *Rights Groups Bid to End 'Influence' Rule*, MSNBC.com, Nov. 9, 2005, http://www.msnbc.msn.com/id/9983118/ (reporting that the ACLU and NAACP advocate that Congress reverse *Ashcroft* in renewed Voting Rights Act).

84. 528 U.S. 320, 341 (2000) (holding with a 5-4 vote that the federal government must grant preclearance to a redistricting plan in a covered jurisdiction, even if the jurisdiction enacted the plan with an intent to discriminate against a protected minority group, so long as the jurisdiction had no intent to make the position of the minority group worse than it had been in the past).

85. *See, e.g.*, Metts v. Murphy, 347 F.3d 346 (1st Cir. 2003) (depublished), *available at* 2003 U.S. App. LEXIS 21987, at *18 ("The Supreme Court's recent opinion in [*Georgia v. Ashcroft*] also supports our conclusion that crossover districts should be considered in the § 2 context."), *vacated on reh'g*, 363 F.3d 8 (1st Cir. 2004) (en banc); *see also* Hall v. Virginia, 385 F.3d 421, 431–32 n.13 (4th Cir. 2004) (rejecting plaintiffs' argument that *Ashcroft* gives plaintiffs an entitlement to a crossover district under Section 2).

86. 478 U.S. 30 (1986).

the circumstances test.[87] Justice O'Connor wrote a concurrence in *Gingles* calling for a more flexible test, one that looks much more like *Ashcroft*.[88]

How much *Ashcroft* will affect the law of Section 2 remains an open question. For example, courts applying *Gingles* may hold that a jurisdiction violates Section 2 when it fails to create a majority-minority district in the face of racially polarized voting and a large, compact, protected-minority voting population. Under *Ashcroft*, the state might be able to defend the failure to create such a district on grounds that the jurisdiction was providing other opportunities to protected minority groups, such as the creation of minority influence districts.

It is hard to predict precisely how the Roberts Court will interpret the Voting Rights Act, particularly because we do not know the extent of congressional tinkering with its provisions at the time of renewal. We do have some clues about Chief Justice Roberts' thinking, however. In 1982, when Congress amended the Act to add the current version of Section 2, Chief Justice Roberts was working in the Reagan White House as the point person opposing the new Section 2. In documents made public during the confirmation process, then-government attorney Roberts wrote that the new Section 2 would "establish essentially a quota system" and "provide a basis for the most intrusive interference imaginable by federal courts into state and local processes."[89] He added that "[i]t would be difficult to conceive of a more drastic alteration of local governmental affairs."[90] Imposing the new Section 2 nationwide, he concluded, would be "not only constitutionally suspect, but also contrary to the most fundamental [tenets] of the legislative process on which the laws of this country are based."[91]

We do not know whether Chief Justice Roberts has changed his views about the Voting Rights Act since 1982, and the question of Section 2's wisdom of course differs from the question of how judges should interpret the statute. However, it suggests Chief Justice Roberts could well be hostile to expansive readings of the Voting Rights Act, and amenable to interpretations such as *Ashcroft* which make it harder for plaintiffs to bring claims under the Act.[92] Presumably that would leave the deciding votes on the questions in the hands of Justice O'Connor's successor, Justice Alito, who could provide the fifth vote for a less expansive reading of the Act.

Justice O'Connor has also been the crucial fifth vote in the racial gerrymandering cases, beginning with *Shaw v. Reno*.[93] In these racial

87. *Id.* at 79–80.

88. *Id.* at 98–100 (O'Connor, J., concurring).

89. Memorandum from John Roberts to Brad Reynolds 2–3 (December 22, 1981), *available at* http://www.lls.edu/academics/faculty/pubs/hasen-roberts-vra-1.pdf.

90. *Id.* at 3.

91. *Id.* at 4.

92. For similar reasons, Chief Justice Roberts could be skeptical of attempts to read Section 2 of the Voting Rights Act to bar state felon-disenfranchisement laws. On this question, see Richard L. Hasen, *The Uncertain Congressional Power to Ban State Felon Disenfranchisement Laws*, 49 HOWARD L.J. (forthcoming 2006).

93. 509 U.S. 630 (1993). For more background on the development of the racial gerrymandering cause of action, see LOWENSTEIN & HASEN, *supra* note 27, at 245–316.

gerrymandering cases, the Supreme Court has held that when a jurisdiction redistricts, it may not take race too much into account in drawing district lines absent a compelling justification. The doctrine has shifted over time, and its contours have depended wholly upon Justice O'Connor's views of the cases. In the most recent of these cases, *Easley v. Cromartie*,[94] Justice O'Connor provided the crucial fifth vote and, with the four more liberal members of the Court, upheld a North Carolina redistricting plan against a racial gerrymandering claim. Justice O'Connor agreed with the four liberal Justices that the composition of the challenged legislative districts was best explained by partisan motivations, not racial ones.[95] What views the two new members of the Court will have on these claims remains to be seen,[96] but racial gerrymandering seems to be an issue that has split the Court along liberal and conservative lines. The Court is likely to continue to split to the extent the Court confronts racial gerrymandering again.

The other major voting rights issue likely to reach the Supreme Court in the next few years is the constitutionality of the renewed preclearance provisions of the Voting Rights Act. In *South Carolina v. Katzenbach*,[97] the Supreme Court upheld the preclearance provisions of the original 1965 Voting Rights Act as a permissible exercise of congressional power to enforce the Fifteenth Amendment's prohibition of discrimination in voting on the basis of race.[98] Calling the requirement that a covered jurisdiction obtain federal approval before changing its own laws "uncommon," the Court declared that "exceptional conditions can justify legislative measures not otherwise appropriate. Congress knew that some of the [covered states] . . . had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees."[99]

As I explain in great detail elsewhere,[100] despite *Katzenbach*, the constitutionality of a renewed preclearance provision has been called into question by the Rehnquist Court's New Federalism jurisprudence, which has reined in congressional power vis-à-vis the states. Beginning with *City of Boerne v. Flores*,[101] the Court has held that when Congress regulates the states under its

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94. 532 U.S. 234 (2001).

95. *Id.* at 255.

96. There is good reason to believe that these claims have reached an end point. Most of the oddly shaped majority-minority districts that caught the Supreme Court's attention in these cases appear to have been drawn as a result of pressure from the Department of Justice on jurisdictions covered by Section 5 of the Voting Rights Act. Various Supreme Court cases interpreting Section 5 removed the legal basis for the DOJ to force covered jurisdictions to draw many additional majority-minority districts, and apparently, for this reason we have seen a decline in the number of racial gerrymandering claims. *See* Richard L. Hasen, *The Supreme Court and Election Law: A Reply to Three Commentators*, 31 J. LEGIS. 1, 12 (2004).

97. 383 U.S. 301 (1966).

98. *Id.* at 308.

99. *Id.* at 334–35 (citations omitted).

100. *See* Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 OHIO ST. L.J., 77 (2005).

101. 521 U.S. 507 (1997).

Fourteenth Amendment enforcement powers,[102] it must provide evidence of intentional state discrimination to justify a remedy—a remedy which must be "congruent" and "proportional" to the state's violations.[103]

From this perspective, the problem for Congress in a renewed Voting Rights Act is finding enough evidence of intentional state discrimination to justify preclearance both today, and potentially for another twenty-five years. The Catch-22 is that since the Voting Rights Act has been so successful, it is hard to find sufficient evidence of such discrimination to satisfy the Court that preclearance remains a congruent and proportional remedy.

In the two most recent Supreme Court cases in this area, the Court seemed to have pulled back a bit from its New Federalism jurisprudence, giving more leeway to Congress to remedy what it perceives to be state discrimination.[104] Those cases, however, depended upon the votes of Justice O'Connor in *Tennessee v. Lane* and Justice O'Connor and Chief Justice Rehnquist in *Nevada Department of Human Resources v. Hibbs*. Chief Justice Roberts has already expressed concern about the federalism costs of Section 2,[105] which could apply equally to a renewed Section 5. Again, the deciding vote on this very important question may remain with Justice Alito. If Justice Alito accepts the stronger version of the New Federalism, there is a significant chance the Court could strike down the renewed preclearance provisions of the Voting Rights Act as exceeding congressional power.

IV. PARTISAN GERRYMANDERING

It seems quite likely that the Supreme Court will need to clarify the issue of partisan gerrymandering within the next decade—perhaps even this Term—if only because the Supreme Court's current resolution of the issue is unstable. Speaking generally, the results of the Court's 2004 decision in *Vieth v. Jubelirer*[106] left the partisan gerrymandering issue undecided. Four Justices—including Chief Justice Rehnquist and Justice O'Connor—took the position that partisan gerrymandering should be nonjusticiable.[107] Four Justices took the position that a state violates the Equal Protection Clause when it takes partisanship into account too much in redistricting, though they differed in the particulars of how to separate permissible use of voters' party registration information from impermissible partisan gerrymandering.[108] Justice Kennedy, the deciding vote in the case, agreed that such

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102. The Court has read the enforcement powers of Congress under the Fourteenth and Fifteenth Amendments as coextensive. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 373 n.8 (2001).

103. *See City of Boerne*, 521 U.S. at 533–34.

104. *See* Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003); Tennessee v. Lane, 541 U.S. 509 (2004).

105. *See supra* text accompanying note 89.

106. 541 U.S. 267 (2004).

107. *Id.* at 281.

108. *Id.* at 317–19 (Stevens, J., dissenting), 343–44 (Souter, J., dissenting), 355–56 (Breyer, J., dissenting).

claims should be justiciable, but he believed none of the Justices who would police partisan gerrymandering had come up with a judicially manageable test to separate out unconstitutional partisan gerrymanders.[109]

The messiness of *Vieth* became apparent almost immediately after the decision. In *Cox v. Larios*,[110] the Court seemed to contradict the logic, if not the holding, of *Vieth* by summarily affirming a lower court decision striking down a Georgia districting plan.[111] Plaintiffs attacked the plan on grounds that it violated the one-person, one-vote rule.[112] Many had believed that such attacks on state legislative redistricting plans were doomed to failure so long as the deviation from population equality in the districts was less than ten percent. Yet the lower court in *Larios* struck down a plan with a deviation below ten percent, partially on grounds that the only explanation for the deviations was a desire to redistrict for partisan advantage.[113] It remains unclear how to square *Cox* with *Vieth*.[114]

In addition, the Court's mixed signals continued elsewhere. Rather than simply summarily affirm a three-judge court's pre-*Vieth* ruling[115] that the Texas congressional redistricting did not violate the Equal Protection Clause,[116] the Supreme Court sent the case back for reconsideration in light of *Vieth*.[117] This was an odd decision because the gerrymander in Texas was in some ways less partisan than the one in Pennsylvania,[118] and there was no reason to believe that the

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109. *Id.* at 306 (Kennedy, J., concurring).

110. 542 U.S. 947 (2004) (summary affirmance).

111. *Id.* at 947 (Stevens, J., concurring).

112. *Id.*

113. *Id.* at 947–49.

114. *See* Issacharoff & Karlan, *supra* note 16, at 564–77. Back in 1985, Justice Alito expressed some disagreement with the one-person, one-vote standards of the Warren Court, and it appears today that he does not believe in a requirement of strict mathematical equality in districting. *See* Richard L. Hasen, *One Person, One Filibuster?*, FINDLAW, Nov. 30, 2005, http://writ.news.findlaw.com/commentary/20051130_hasen.html (discussing uncertainty about Justice Alito's views on one-person, one-vote rules). In written answers to the Senate Judiciary Committee considering his nomination to the Supreme Court, Justice Alito wrote:

> As far as I can recall, I have always agreed with the principle of one-person, one-vote. In any event, that is certainly my view today. I explained during the hearings that my concern about reapportionment during my college days related to the application of this principle in later cases to require that all districts be almost exactly equal in population even if this requires disregarding other legitimate factors.

Judge Samuel A. Alito, Jr., Responses of Samuel A. Alito, Jr. to the Written Questions of Senator Charles E. Schumer 11 (Jan. 20, 2006), *available at* http://legalaffairs.org/howappealing/AlitoAnswers012006.pdf.

115. Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (three-judge court).

116. *Id.* at 457.

117. Henderson v. Perry, 543 U.S. 941 (2004) (vacating judgment and remanding for further consideration in light of *Vieth*).

118. Or at least so the three-judge court concluded on remand. *See* Henderson v. Perry, 399 F. Supp. 2d 756, 770 (E.D. Tex. 2005) ("In short, under the plan passed by the Pennsylvania General Assembly and upheld by the Court in *Vieth*, the party that garnered, on average, less than half the vote in statewide races was able to capture nearly two-thirds of Pennsylvania's congressional seats. In contrast, the plan passed by the Texas legislature resulted in the election of twenty-one Republicans and

plaintiffs in the Texas case would do any better than the *Vieth* plaintiffs in developing a judicially manageable partisan gerrymandering standard that would satisfy Justice Kennedy.

The Texas case is back before the Supreme Court after the three-judge court reached the same conclusion it had reached before in *Vieth*. While this confusion should lead the Supreme Court to tackle the issue again in the near future, it is not clear how changes in Court personnel will affect the outcome of the case. If Chief Justice Roberts and Justice Alito vote as their predecessors did and no other Justices change their positions, we would be left with the same 4-1-4 split on this question. But if either Chief Justice Roberts or Justice Alito side with the four *Vieth* dissenters, there would be a majority willing to impose a standard that would have the courts policing at least some partisan gerrymanders. Another possibility, of course, is that Justice Kennedy commits himself more fully to one side of this controversy or the other, forming a five-Justice majority.

How the new Justices are likely to vote on this issue is difficult to determine. In *Vieth*, the Court split with the four more liberal members of the Court supporting the policing of partisan gerrymandering and four of the five more conservative members supporting nonjusticiability. I suppose that a continued 4-1-4 split is the most likely outcome. However, partisan gerrymandering does not necessarily create a liberal-conservative split. Consider, for example, former professor and current Tenth Circuit Judge McConnell. Judge McConnell is considered to be conservative on many issues, such as abortion.[119] Yet, he has shown a willingness to consider whether courts should police partisan gerrymandering claims.[120]

V. EQUAL PROTECTION IN THE ADMINISTRATION OF ELECTIONS

The final major issue the Supreme Court is likely to face results from the direct and indirect fallout from the 2000 Florida election controversy, culminating in the Court's opinion in *Bush v. Gore*.[121] In that case, the Supreme Court ended the controversy over whether George W. Bush or Al Gore would be declared the winner of Florida's twenty-five electoral votes—and therefore the winner of the 2000 presidential election—when it held that the selective manual recounts the Florida Supreme Court ordered violated the Equal Protection Clause of the Fourteenth Amendment.[122]

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eleven Democrats to the House of Representatives in 2004, when the Republican Party carried 58% of the vote in statewide races and the Democratic Party carried 41% of the vote.").

119. *See* David Von Drehle, *O'Connor Used Vote to Entrench Right to Abortion*, WASH. POST, July 2, 2005, at A10 ("Before becoming a judge in 2002, McConnell was one of America's leading antiabortion thinkers and once described the original abortion rights decision, *Roe v. Wade*, as an 'embarrassment.'").

120. *See* Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J. L. & PUB. POL'Y 103, 114–16 (2000).

121. 531 U.S. 98 (2000).

122. *Id.* at 103.

After the opinion issued, scholars debated whether the opinion had precedential value and, if so, whether it properly should be read as a case about giving voters roughly equal treatment in how their votes are cast and counted, or about making sure that partisan election officials do not have too much discretion in the rules they use for administering elections.[123] The Supreme Court has failed to cite the case since it has been decided, even when an issue on all fours with Chief Justice Rehnquist's concurrence came before the Court.[124]

In the meantime, some lower courts are using *Bush v. Gore* as an equal protection precedent[125] with an emerging judicial division on its scope and meaning in the context of suits against jurisdictions that have failed to update their voting equipment from the outdated and unreliable "punch card" voting machines that gained notoriety from their use in some of the Florida counties in the *Bush v. Gore* case.

More importantly, the case has apparently had the indirect effect of opening up the lower courts to more election law cases. From 1996 to 1999, an average of ninety such cases came before lower courts per year, and from 2000 to 2004, the number rose to an average of 361 cases per year.[126] Most of these cases did not raise equal protection claims, but they did show that litigation over the nuts and bolts of elections has increased in the wake of the Florida 2000 controversy.

The Supreme Court must eventually resolve the scope of its ruling in *Bush v. Gore*. As Chief Justice Roberts noted at his confirmation hearings:

> While it is true that the precise facts presented in *Bush v. Gore* are not likely to come before the Court again, it is not at all improbable that other election disputes will. While the Court in *Bush v. Gore* stated that its "consideration is limited to the present circumstances," I believe that statement was not meant to deprive the decision of all precedential weight but, rather, to make clear that the precise facts of the case were unique. And while it is undoubtedly true that "the problem of equal protection in election processes generally presents many complexities," the equal protection principles at issue in *Bush v. Gore* may be implicated in future cases.[127]

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123. *See* Hasen, *supra* note 19, at 378–80.

124. *See* Hasen, *supra* note 20, at 957 n.76.

125. *Compare* Black v. McGuffage, 209 F. Supp. 2d 889, 899 (N.D. Ill. 2002) (holding that Illinois' selective use of punch-card voting machines is a potential equal protection violation), *with* Stewart v. Blackwell, 356 F. Supp. 2d 791, 808–09 (N.D. Ohio 2004) (holding that Ohio's selective use of punch-card machines is not an equal protection violation).

126. Hasen, *supra* note 20, at 958.

127. Judge John. G. Roberts, Jr., Responses of Judge John G. Roberts, Jr. to the Written Questions of Senator Charles E. Schumer 6, *available at* http://legalaffairs.org/howappealing/RobertsAnswers3.pdf.

In what sorts of future cases will this issue arise? Consider, for example, the current controversy over Georgia's voter identification law.[128] Georgia recently passed a law requiring that voters produce voter identification before being able to vote at the polls, though it did not require the production of a voter identification to file an absentee ballot.[129] Voters can use only certain forms of identification such as a state driver's license, and the state has provided means for poor voters to obtain identification from the state without charge.[130] However, to obtain that state identification, voters need to produce documents, such as a birth certificate, that often cost money to obtain.[131]

Over the objections of civil rights organizations, the Department of Justice precleared the Georgia voter identification law under Section 5 of the Voting Rights Act.[132] Plaintiffs then filed suit in federal district court, claiming that the law violated the Equal Protection Clause and Section 2 of the Voting Rights Act.[133] The district court issued a preliminary injunction against the law, ruling that plaintiffs were likely to be able to prove an Equal Protection violation on grounds the law is a de facto "poll tax."[134] The Eleventh Circuit is currently considering an appeal of the preliminary injunction.[135]

The Georgia case is just one of the many kinds of nuts-and-bolts election law cases that can make their way to the Supreme Court in the next decade. In the 2004 election, we saw constitutional challenges over how to count provisional ballots, the propriety of election "challengers" challenging particular voters' qualifications to vote, and questions over the means for the counting and recounting of votes in the Washington gubernatorial race.[136]

While we do not know how the Supreme Court will resolve these kinds of claims if and when they are considered, a Supreme Court made up of a conservative majority is unlikely to read the Equal Protection Clause expansively so as to open up the courts to many equal protection challenges to the nuts and bolts of elections. Indeed, it was this instinct that a conservative Court would not read the Equal Protection Clause expansively which made the holding of *Bush v. Gore* so surprising, and drew criticism of the majority—that it engaged in result-oriented

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128. The federal district court opinion granting a preliminary injunction against the Georgia voter identification law under both the Voting Rights Act and the Equal Protection Clause contains a history of the law and the surrounding litigation. *See* Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

129. *Id.* at 1331, 1361–62, 21–22.

130. *Id.* at 1336, 1338–40.

131. *Id.* at 1340.

132. *Id.* at 1336–37.

133. *Id.* at 1354.

134. Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326, 1376 (N.D. Ga. 2005).

135. *See* Common Cause/Georgia v. Cox, No. 05-15784-G (11th Cir. Oct. 27, 2005), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/11thCircuitDenial.pdf. The Eleventh Circuit refused to grant Georgia's motion for a stay of the preliminary injunction pending appeal.

136. More information about this litigation appears in Hasen, *supra* note 20, at 968–69.

judging to benefit a Republican candidate.[137] Still, outside the context of the highly charged presidential election of 2000, I do not expect the Roberts Court to read the Equal Protection Clause expansively in this area.

VI. CONCLUSION

Making predictions is always dangerous, and the conclusions I reach should be taken in the tentative spirit in which they are made. My best guess is that a decade from now, we may well face a set of election law rules that differ a great deal from today's rules. It may be that in 2016, individuals, corporations, and unions will be free to give as much money as they want to any candidate or group, subject to the filing of disclosure reports. The federal government's ability to protect the voting rights of minority groups that historically have been the victims of state discrimination may be curtailed by the inability of Congress to require any jurisdictions to submit their voting changes for preclearance and by an emasculated reading of Section 2 of the Voting Rights Act. The ability of states to manipulate election rules for partisan gain may present the greatest danger as the Court exits from that corner of the political thicket. For those who look to courts for the promotion of political equality, the signs are not encouraging.

137. *See* Hasen, *supra* note 19, at 390 ("It is not so much that these Justices do not 'like' equal protection as that we would not have expected them to use the Equal Protection Clause to create new federal oversight of the minutiae of state and local elections. Besides the federalism costs which make the majority's holding surprising, no Rehnquist Court opinion had ever relied upon [*Reynolds v. Sims*, 377 U.S. 533 (1964)] or [*Harper Virginia Board of Elections*, 383 U.S. 663 (1966)] to expand oversight of the electoral process or to expand the franchise." (footnotes omitted)).